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No. 75-226

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES SPINELLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondent has filed what is styled "Respondent's Waiver of Right to File Brief in Opposition to Petition for Writ of Certiorari." Attached thereto is a copy of a "judgment of acquittal" as to respondent which was filed by the district court on July 10, 1975, pursuant to the mandate of the court of appeals. We take this to be a contention by respondent that this Court is by that event somehow divested of jurisdiction or otherwise precluded—presumably on grounds either of mootness, *res judicata,* or double jeopardy—from granting the petition for a writ of certiorari in this case. We file this response to show that the action

of the district court in no way interferes with effective review of the judgment of the court of appeals by this Court.

1. As noted in our petition, the judgment of the court of appeals was entered on January 13, 1975. The government's petition for rehearing, with a suggestion for rehearing *en banc,* was denied on June 11, 1975. On July 1, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including August 10, 1975 (a Sunday). The government's petition for a writ of certiorari was filed with this Court on August 11, 1975.

The mandate of the court of appeals issued routinely on June 19, 1975; no stay of the mandate was sought or obtained. In the normal course, the mandate was spread on the record by the district court, which entered a judgment of acquittal as to respondent on July 10, 1975.[1]

2. It is well established that issuance of the mandate by the court of appeals, and spreading said mandate by the district court, does not defeat the jurisdiction of this Court. See *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 467; *Carr* v. *Zaja,* 283 U.S. 52, 53; *The Conqueror,* 166 U.S. 110, 113; *Louisville & Nashville R.R. Co.* v. *Behlmer,* 169 U.S. 644, 648. In *Carr* v. *Zaja, supra,* this Court reversed a decision by the court of appeals ordering the release of an alien sea-

[1] Since the decision of the court of appeals rested on double jeopardy grounds, the mandate should properly have directed dismissal of the indictment with prejudice rather than entry of a judgment of acquittal. The technical distinction is, of course, of no practical importance. See n. 2, *infra.*

man who had been arrested and was about to be deported. The mandate of the court of appeals was not stayed, "but was issued to the District Court and spread upon its records * * *." *Carr* v. *Zaja, supra,* 283 U.S. at 53. On this basis it was argued that the case was "finished." This Court (per Mr. Justice Holmes) held simply that the issuance and spreading of the mandate does not defeat the jurisdiction of the Court. *Ibid.*

Likewise, we believe, the issuance of the mandate by the court of appeals in the instant case does not defeat the jurisdiction of this Court to grant the petition for a writ of certiorari pursuant to the authority conferred by 28 U.S.C. 1254(1). Nor does the spreading of the mandate and entry of the judgment of acquittal render this case "finished" or otherwise moot. The government's petition for a writ of certiorari was timely filed. This operates to suspend the finality of any judgment until this Court disposes of the case. If this Court grants certiorari and reverses the judgment of the court of appeals, that action will nullify the mandate of the court of appeals and, by the same token, the order of the district court entered pursuant thereto.

3. This Court's ability to hear and determine this case is not impaired by the fact that it is a criminal case. The proscription of the Fifth Amendment against double jeopardy is not implicated. The various procedures and filings that followed the court of appeals' decision in this case do not themselves amount to a jeopardy proceeding. Cf. *Serfass* v.

United States, 420 U.S. 377; *United States* v. *Jorn,* 400 U.S. 470. The judgment of acquittal entered by the district court is not pursuant to a verdict of acquittal at the hands of a jury, but pursuant to a conclusion of law of the court of appeals which we have timely sought to have reviewed.[2] As noted in our petition, respondent was initially convicted after a jury trial. A reversal of the court of appeals' judgment by this Court, therefore, will not have the effect of placing respondent twice in jeopardy. See *Serfass* v. *United States, supra; United States* v. *Wilson,* 420 U.S. 332.

4. If this Court entertains any doubt about its jurisdiction in this case because of the entry of the judgment of acquittal, we submit that the question thereby raised provides an additional compelling reason to grant the petition for a writ of certiorari. When a court of appeals has reversed a conviction without ordering any specific affirmative action to be undertaken thereafter by the parties, the government customarily does not seek a stay of the mandate while the Solicitor General considers seeking, or seeks, Supreme Court review. It is our view that no such stay is necessary to preserve this Court's jurisdiction or protect the government's rights of review in this Court. A requirement that a stay be obtained in these circumstances would cause severe practical problems for the government, as well as precipitate a flood of protective stay applications, since the decision whether or not to seek certiorari normally cannot be made by the Solicitor General prior to the issuance of the mandate.

[2] The disposition of the case in terms of a "judgment of acquittal" should not be given "talismanic" significance or "divorced from the procedural context in which the action so characterized was taken." *Serfass* v. *United States, supra,* 420 U.S. at 392.

Any rule requiring that stays be obtained in such cases thus appears unsound as a matter of effective judicial administration. If, moreover, protective stays are required, thereby necessitating revision of the government's customary practices, it is important that authoritative clarification be provided by this Court.

For the reasons stated in our petition and this reply memorandum, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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